Supreme Court, U.S.
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No. 96-886

In The

Supreme Court of the United States

October Term, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

STANLEY KNAPP, On Behalf of Himself and All Others Similarly Situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to determine whether a general jury verdict must be overturned when one of two alternate theories of liability – submitted without objection and at the request of both parties – later is identified as legally erroneous, but the district court specifically finds that the jury relied on the proper theory of liability so that any error was harmless?

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I. INTRODUCTION

Ernst & Young says the question presented is "[w]hether a general jury verdict may stand when one of two alternate theories of liability submitted to the jury is legally erroneous." But Ernst & Young's petition makes this issue sound worthy of certiorari review only by omitting important facts and overlooking this Court's long-standing harmless-error doctrine.

First, Ernst & Young *itself* asked the district court to instruct the jury on the theory of liability later determined to be "erroneous." A case with such an invited error is not a proper candidate for review by this Court. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam); *see infra* at 15-16.

Second, the district court found that the jury did not rely on the "erroneous" aiding-and-abetting theory. That court carefully reviewed the record and expressly found it "unlikely that the jury found the defendant liable on a secondary theory of liability or that the jury was otherwise confused." 43a. The court found that the record in this case demonstrates that the "jury's finding in favor of the plaintiffs was sufficient to subject the defendant to primary liability." 43a.

Nonetheless, Ernst & Young contends that the Ninth Circuit's affirmance is at odds with this Court's decisions, and with the law of other circuits, because the Ninth Circuit followed Justice (then Judge) Anthony M. Kennedy's opinion for the court in *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980), which held that " '[w]here more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that

as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error.' " 14a-15a (quoting *Traver*, 627 F.2d at 938).

According to Ernst & Young, this holding conflicts with this Court's ruling in *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884), that "[i]f . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld." Ernst & Young says that while several courts have violated this supposedly absolute and inviolable rule by recognizing a harmless-error exception the Ninth Circuit's offense is somehow worse, for it recognizes judicial *discretion* to attribute a verdict to a validly-submitted theory. Ernst & Young's argument overlooks one of the most basic principles of judicial review of jury determinations – that in appropriate circumstances an error "either in the admission of evidence or in the charge of the court," *Baldwin*, 112 U.S. at 493, may be found to be harmless. Capital punishment can even be imposed after a trial which included errors, so long as the errors are adjudged harmless.[1]

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[1] *See Clemons v. Mississippi*, 494 U.S. 738, 752-54 (1990); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (holding that harmless-error analysis applies to death-penalty phase of a criminal trial).

The fact that a harmless-error finding is a discretionary and fact-specific determination eviscerates Ernst & Young's claim of conflict among the circuits. Because harmless-error determinations are discretionary, there is nothing particularly remarkable about Justice Kennedy's holding in *Traver*, or Judge J. Clifford Wallace's holding below, that in appropriate circumstances a court has " 'discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error.' " 14a-15a (quoting *Traver*, 627 F.2d at 938).

Moreover, depending on the record in each case, courts sometimes will hold that an erroneous instruction was harmless, and sometimes they will not. That is neither surprising, nor a "circuit split." Although verbal formulations may vary somewhat from case to case, there is no genuine conflict among the circuits that warrants this Court's review.

II. STATEMENT OF THE CASE

This case is a securities-fraud class action in which the jury returned a verdict against the Chief Executive Officer and Chief Financial Officer of ATV Systems Corp. ("ATV" or the "Company") and against its independent public accountants, Ernst & Young, under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). To secure this verdict plaintiff Stanley Knapp, who had purchased ATV stock after ATV's initial public offering, presented evidence showing that the prospectus for ATV's October 18, 1983, initial public offering of common stock was false or misleading.

In particular, the prospectus contained financial statements for the year ending March 31, 1983, and for the three months ending June 30, 1983, which were false. Ernst & Young certified the March 31, 1983 financials, stating that it had examined them in accordance with Generally Accepted Auditing Standards ("GAAS") and that the financial statements "present fairly the consolidated financial position of ATV . . . at March 31, 1983." ER Ex. 4a:45. Ernst & Young's opinion was unqualified, and it failed to disclose any issues relating to ATV's ability to do business as a "going concern." ER Ex. 4a:45.

After the offering, ATV's finances appeared to take a dramatic turn for the worse, and by January 1984, the Company was reporting losses for the quarter in which it went public. *See* 4a, 47a-48a. One year after the offering, ATV's stock was delisted by NASDAQ, RT 13:2812-13, 2896, and by 1986 the Company was in bankruptcy. RT 1:145. Knapp presented evidence showing that the apparent dramatic reversal in ATV's reported financial results was not, in truth, a reversal at all. Rather, ATV's financial condition had been misrepresented in the prospectus.

The focus of the case always was the financial statements in the prospectus for the initial public offering and Ernst & Young's omission of a "going concern" qualification. *See* 16a, 42a-43a, 53a-60a. Evidence showed that Ernst & Young knew that the Company was in no position to prepare and report accurate financial statements, yet Ernst & Young certified the Company's financial statements. *See* 42a-44a, 53a-60a. An accounting expert testified that in light of what Ernst & Young knew, it could not legitimately issue an unqualified opinion for inclusion in the prospectus. 42a-43a, 56a-59a. Moreover,

evidence showed that Ernst & Young knew that the offering would not raise enough money for ATV to continue as a going concern. *See, e.g.*, 57a-58a n.6. Yet Ernst & Young failed to include a "going concern" qualification – as required by GAAS.

After the parties presented their evidence, both Knapp and Ernst & Young asked the district court to instruct the jury on both primary liability and aiding-and-abetting. *See* SER 440:103-05. The district court did so. The jury returned a verdict against Ernst & Young and the two ATV officers on February 10, 1992. Two years later, Ernst & Young objected for the first time that an aiding-and-abetting instruction should not have been given because, in the interim, this Court had held that there is no private cause of action for aiding and abetting a § 10(b) violation. *See Central Bank v. First Interstate Bank*, 511 U.S. 164, 114 S. Ct. 1439 (1994).

After full briefing and argument, the district court denied Ernst & Young's motion for a new trial because "[t]he plaintiffs did not emphasize a theory of secondary liability to the jury or urge the jury to return a verdict in their favor on the basis of secondary liability." 42a. "Instead, the evidence relating to the defendant focused upon the alleged deceptive financial statements," for which Ernst & Young would be primarily, rather than secondarily, liable. 42a. "Thus, the focus of the evidence presented against the defendant was evidence relating to the plaintiff's theory that ATV's financials materially misstated the company's current economic posture and known future prospects." 43a. "*This evidence*," the district court found, "*establishes primary rather than secondary liability*." 43a (emphasis added). Thus, in light of the case

Knapp had presented, *the district court found "it unlikely that the jury found the defendant liable on a secondary theory of liability* or that the jury was otherwise confused." 43a (emphasis added).

The district court also noted that the defense presented by Ernst & Young bolstered this conclusion. Ernst & Young had asserted that the financial statements for which it was responsible were not deceptive, but "[t]he jury necessarily rejected this defense in returning a verdict for the plaintiffs." 43a. Thus, the "jury's finding in favor of the plaintiffs was *sufficient to subject the defendant to primary liability.*" 43a (emphasis added). Any error in giving the aiding-and-abetting instruction was harmless.

The Ninth Circuit affirmed, noting that "[t]he district court, after reviewing the record, stated that it was 'unlikely that the jury found the defendant liable on a secondary theory of liability.' " 16a. The Ninth Circuit agreed, concluding that "a review of the entire transcript supports the district court's position that the parties emphasized Ernst & Whinney's failure to include a going concern qualification," rather than any theory of secondary liability. 16a. Moreover, it held that the district court also had properly considered " 'whether privileges or defenses of the losing party apply to the count upon which the verdict is being sustained so that they would have been considered by the jury with reference to the count.' " 17a (quoting *Traver*, 627 F.2d at 938-39). The district court had properly found that, by rejecting Ernst & Young's defenses, the jury had found the firm primarily liable.

Indeed, the Ninth Circuit noted that the trial court had correctly "decided that underlying both theories of liability were similar issues of fact." 18a. " 'The critical element separating primary from aiding and abetting violations,' " the Ninth Circuit observed, " 'is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the plaintiff.' " 18a (quoting *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1225 (10th Cir. 1996)). Because it was undisputed that Ernst & Young had itself made the statements in the prospectus that were the focus of this case, the firm was primarily liable if it was liable at all. *See Central Bank*, 114 S. Ct. at 1455; *In re Software Toolworks, Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1995).

Thus, according to the Court of Appeals "the primary issues of fact were whether the statements made within ATV's financial statements were deceptive and whether Ernst & [Young] acted with scienter." 18a. By finding against Ernst & Young on those issues, the jury effectively found that the firm was a primary violator of § 10(b), and any error in instruction was harmless.

III. REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among The Circuits

Ernst & Young contends that the decision below conflicts with this Court's statement in *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884): "If . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld." According to Ernst & Young, this statement permits no exceptions. The trouble with Ernst & Young's argument is

that it ignores this Court's harmless-error jurisprudence. *See McDonough Power Equipment Co. v. Greenwood*, 464 U.S. 548, 553-54 (1984).

This Court has long held that erroneous jury instructions "furnish ground for reversal *unless it affirmatively appears that they were harmless.*" *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) (emphasis added). An erroneous instruction does not require reversal if it appears that, in light of the case presented, "its effect is not appreciable." *Thomsen v. Cayser*, 243 U.S. 66, 89 (1917). This harmless-error rule and the principle of *Maryland v. Baldwin* are not contradictory; they coexist because the latter applies if the error was *not* harmless. *See Asbill v. Housing Authority*, 726 F.2d 1499, 1504 (10th Cir. 1984); *American Airlines, Inc. v. United States*, 418 F.2d 180, 195 (5th Cir. 1969). Even in criminal cases, when life and liberty are at stake, this Court recognizes a harmless-error exception to the usual rule that an erroneous jury instructions require reversal.[2]

This Court's opinions simply do not support the absolutism of Ernst & Young's argument. In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993), for example, this Court struck down a jury verdict apparently based on an erroneous theory of liability under § 2 of the Sherman Act, explaining that "[r]espondents conceded in their brief that the case should be remanded to

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[2] *See United States v. Gaudin*, ___ U.S. ___, 115 S. Ct. 2310, 2321-22 (1995) (Rehnquist, J., concurring); *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991); *Rose v. Clark*, 478 U.S. 570, 583-84 (1986).

the Court of Appeals if we found error in the instruction," *id.* n.10, but indicating that reversal of a jury verdict for instructional error is anything but automatic:

> *Since the affirmance of the § 2 judgment against petitioners rested solely on the legally erroneous conclusion* that petitioners had attempted to monopolize in violation of § 2 *and since the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone,* the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Id. at 892 (emphasis added). In this case the district court and Ninth Circuit upheld the jury verdict on the ground that *primary liability* had been found, and because the verdict itself and the trial record *did,* in the words of *Spectrum Sports,* 506 U.S. at 459, "negate the possibility" that Ernst & Young had been held liable for merely aiding-and-abetting another's violation.

Ernst & Young's supposed "conflict" among the circuits is illusory. The lower courts have followed this Court's lead in applying the harmless-error rule to instructional error: " 'Harmless error analysis normally applies in civil cases . . . and it specifically applies to faulty jury instructions.' "[3] Although the circuit courts

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[3] *U.S. Industries, Inc. v. Touche Ross & Co.,* 854 F.2d 1223, 1253 n.40 (10th Cir. 1988) (quoting *Lusby v. T.G. & Y. Stores, Inc.,* 796 F.2d 1307, 1310 (10th Cir. 1986)); *see, e.g., Pressley v. Haeger,* 977 F.2d 295, 297-98 (7th Cir. 1992); *Smith v. Chesapeake & Ohio Ry. Co.,* 778 F.2d 384, 389 (7th Cir. 1985); *McIlroy v. Dittmer,* 732 F.2d 98, 105 (8th Cir. 1984); *Jenkins v. Whittaker Corp.,* 785 F.2d 720, 730 (9th Cir. 1986); *E.F. Hutton & Co. v. Berns,* 682 F.2d 173,

frequently state that a jury verdict cannot stand if the jury might have returned it on the basis of an erroneous instruction, they also recognize – with similar frequency – that a jury verdict may stand if the erroneous instruction was not the basis of the verdict or was otherwise harmless.[4]

Sometimes the lower courts simply say a general verdict may be upheld if the improper instruction was "harmless" error.[5] Other times they speak of a discretionary determination that the jury returned its verdict on a

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177 (8th Cir. 1982); *Keller v. Brooklyn Bus Corp.*, 128 F.2d 510, 512-13 (2d Cir. 1942); *see also* 7 James Wm. Moore, *Moore's Federal Practice* § 61.09, at 61-390 (2d ed. 1996 Rev.).

[4] *See, e.g., Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 974-75 (9th Cir. 1994); *Tioga Public School Dist. #15 v. United States Gypsum Co.*, 984 F.2d 915, 921-22 (8th Cir. 1993); *Circle J Dairy v. A.O. Harvestore Products*, 790 F.2d 694, 701-02 (8th Cir. 1986); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991); *Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981); *E.I. du Pont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1310 (10th Cir. 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1436 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967 (1979); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976); *Gardner v. General Motors Corp.*, 507 F.2d 525, 529 (10th Cir. 1974); *Adkins v. Ford Motor Co.*, 446 F.2d 1105, 1108-09 (6th Cir. 1971); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 837-38 (2d Cir. 1967).

[5] *See Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989); *Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1310 (10th Cir. 1986); *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1436-37 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985); *Syrie v. Knoll Int'l*, 748 F.2d 304, 310 (5th Cir. 1984); *Asbill v. Housing Authority*, 726 F.2d 1499, 1504 (10th Cir. 1984).

proper theory – as the Ninth Circuit did both in *Traver* and in this case.[6]

This semantic difference falls far short of an irreconcilable inter-circuit conflict, for a finding of harmless error necessarily is a *discretionary* determination.[7] "[T]he discrimination it requires is one of judgment transcending confinement by formula or precise rule." *Kotteakos v. United States*, 328 U.S. 750, 761 (1946). The principle underlying the harmless-error rule is that courts "should *exercise judgment* in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial."[8]

That is precisely what the district court did in this case – and it was authorized to do so by Federal Rule of

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[6] *See* 15a; *Traver*, 952 F.2d at 1140; *see also Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989); *Circle J Dairy v. A.O. Harvestore Products*, 790 F.2d 694, 701-02 (8th Cir. 1986); *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984); *Gardner v. General Motors Corp.*, 507 F.2d 525, 529 (10th Cir. 1974); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *American Airlines, Inc. v. United States*, 418 F.2d 180, 195 (5th Cir. 1969).

[7] *See Clemons*, 494 U.S. at 754 (harmless-error analysis is discretionary, not compulsory); *Illinois v. Gates*, 462 U.S. 213, 216 n.18 (1983) (White, J., concurring) (Court exercises discretion in deciding whether to rely on harmless-error doctrine).

[8] *McDonough Power Equip.*, 464 U.S. at 554 (emphasis added); *see Golden Eagle Ins. Co. v. Travelers Cos.*, 95 F.3d 807, 812 (9th Cir. 1996) (following *McDonough*).

Civil Procedure 61.[9] Rule 61's meaning is clear: "The district court in passing on a motion for a new trial or in considering whether to set aside a verdict or otherwise to disturb a judgment or order must be guided by what substantial justice requires and must disregard errors that were harmless." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2882 at 444 (2d ed. 1995) (footnote omitted). Ernst & Young condemns this approach as an " 'indefensible brand of judicial activism,' " Petition at 11, but there is nothing particularly "activist" about Justice Kennedy's opinion in *Traver*, 627 F.2d at 938, or Judge Wallace's opinion in this case, which affirms the district court's careful conclusion that the jury found primary liability. *See McDonough Power Equipment*, 464 U.S. at 553-56.

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[9] 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2881, at 441 (2d ed. 1995). Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61; *see also* 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.").

Ernst & Young complains that it is impossible to know with absolute certainty precisely what motivated jurors to enter a general verdict, but "any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decision-making process; for in the end no judge can know for certain what factors led to the jury's verdict." *Sullivan v. Louisiana*, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring). And Ernst & Young has it wrong in any event. The court's role is not to "retrace the jury's deliberative processes," but to consider whether the facts found by the jury are such "that if the jury had never heard the impermissible instruction its verdict would have been the same." *Pope v. Illinois*, 481 U.S. 497, 503 n.6 (1987). That is precisely what the district court found here, and the Ninth Circuit affirmed.

The results of any such inquiry necessarily will turn on the particular facts and record in each case. Thus, the fact that *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215 (10th Cir. 1996), overturned a § 10(b) verdict after the jury was instructed on aiding-and-abetting liability, while this case affirmed a verdict, does not mean there is a circuit split. *On the facts* of *Anixter* it was impossible to tell whether the jury had effectively found the defendant liable for a primary violation of § 10(b), and the likelihood of jury confusion was substantial. 77 F.3d at 1229-31. *On the facts* of this case, by contrast, the district court was able to determine that the jury returned a verdict of primary liability without confusion. 43a.

In *Anixter*, it was impossible to determine if the jury found the defendant had made statements with scienter – as the general verdict included § 11 claims, 15 U.S.C.

§ 77k, which do not require scienter. 77 F.3d at 1230. In this case, however, the jury necessarily found Ernst & Young acted with the required scienter for a § 10(b) violation, and the "jury's finding in favor of the plaintiffs was sufficient to subject the defendant to primary liability." 43a.

There is no irreconcilable conflict between *Anixter* and this case. To the contrary, the notion that *Anixter* demonstrates the existence of an irreconcilable conflict between the Ninth and Tenth Circuits on instructional error and jury verdicts is flatly contradicted both by the existence of Tenth Circuit cases holding that a general verdict may be sustained despite instructional error,[10] and by the many Ninth Circuit cases applying *Traver* to *reverse* a general verdict where instructional error was not obviously harmless.[11]

Ernst & Young's other efforts to manufacture a conflict among the circuits are even more desperate – based on nonprecedential unpublished opinions, an isolated dissent, and obiter dictum taken out of context. Although Ernst & Young suggests that the Seventh Circuit in *McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981), adopted a rule that " 'to triumph on appeal, defendants must show that under none of the [alternative]

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[10] *See Lusby*, 796 F.2d at 1310-11; *Lusby*, 749 F.2d at 1436; *Asbill*, 726 F.2d at 1504; *Gardner*, 507 F.2d at 529.

[11] *See, e.g., Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 62 F.3d 280, 286 (9th Cir. 1994); *Oglesby v. Southern Pacific Transp. Co.*, 6 F.3d 603, 610 (9th Cir. 1993); *Counts v. Burlington Northern R.R. Co.*, 952 F.2d 1136, 1140 (9th Cir. 1991).

rationales [supporting a general verdict] was plaintiff entitled to' judgment," Petition at 14 (quoting *McGrath*, 651 F.2d at 464), this fragment turns out to be an utterly trivial obiter dictum. Even Ernst & Young admits that *McGrath* found *all* of the submitted theories legally and factually sound. The *rule* in the Seventh Circuit is that a verdict may be sustained if "the results of the . . . trial would not have been substantially affected if these issues had not been submitted to the jury." *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970). That is, in effect, a harmless-error rule, not significantly different from the Ninth Circuit's jurisprudence. *See id.*

B. Even If The "Conflict" Were Real, This Is Not An Appropriate Case For This Court's Review

Even if a genuine conflict among the circuits existed on the question Ernst & Young seeks to present, this case would be a poor candidate for resolving it.

Although Ernst & Young contends the district court erred by instructing the jury on aiding-and-abetting liability, the district court did so only after Ernst & Young itself had requested it. *See* SER 440:103-05. Invited error should not cloud the issues on a case presented for this Court's review. Federal Rule of Civil Procedure 51 commands: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." This Court will dismiss a writ of certiorari as improvidently granted if a petitioner did not comply with Rule 51, *see City of Springfield v. Kibbe*, 480

U.S. 257, 259 (1987) (per curiam), and even when the courts below overlook the defect this Court finds "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." *Id.* at 257. "That the Court of Appeals was fortunate enough to entertain the issue without reaching that outcome would not justify our running the same risk." *Id.* at 259.

Review is particularly inappropriate for the additional reason that this case deals with the effect of *Central Bank* on jury trials completed before *Central Bank* was decided. We are aware of only two reported decisions in which *Central Bank* arguably affected a prior jury verdict: this case and *Anixter*. Any possible inconsistency between the results in these two cases is factual, *see supra*, at 13-14, and does not suggest an issue of broad importance to be decided by this Court. *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (dismissing writ as improvidently granted because issues were factual).

IV. CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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